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Facsimile: (000) 000-0000

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

)

Judge

## STATEMENT OF FACTS

(2) On concerns issue which or around September 3, 1999, the State of Utah Division of Child

and Family Services filed a petition in this matter in the Third District Juvenile Court. The petition alleged that Respondents' children were abused, neglected or dependent in that (a) Respondent Mother was homeless and/or incarcerated, and for that reason could not properly care for the children, and (b) Respondent Father was incarcerated and for that reason could not care for the children.

(2) At adjudication of the State's petition on February 15, 2000, Respondents admitted the substantive allegations of the petition. Based upon Respondents' admission, this court found that the children were neglected due to Mother's homelessness and incarceration, and due to Father's incarceration.

(3) Subsequent to the court entering its findings, counsel for DCFS informed the court that he intended to request, as part of the dispositional order, that the parents submit to psychological evaluations and possibly drug evaluations and urinalysis. Counsel for Respondents objected to such orders as inappropriate, given the limited findings made by the court at adjudication.

(4) In response to counsels' arguments, this court ordered the parties to prepare memoranda addressing the issue of whether the juvenile court can enter dispositional orders that do not directly relate to the court's adjudicated findings; specifically, whether the court's finding of Respondents' homelessness and incarceration permitted the court to order psychological evaluations and drug evaluations and testing as part of its dispositional order.

### **ARGUMENT**

#### **PROCEDURAL DUE PROCESS REQUIRES THAT DISPOSITIONAL ORDERS BE DIRECTLY RELATED TO THE ADJUDICATED FINDINGS OF FACT**

Under the procedural due process provisions of the Utah and United States Constitutions,

parties to legal proceedings must be provided with notice of the allegations against them, and an opportunity to respond to those allegations. In civil child protection proceedings, due process prevents a court from entering dispositional orders that are not supported by the court's specific findings of fact from adjudication. For instance, in the California case State in re. Neal D. and Leola D., , 23 Cal.App.3d 1045, 100 Cal.Rptr. 706 (5<sup>th</sup> Dist. 1972), a petition was filed alleging that the children were dependent due to the parent's failure to provide a suitable place of abode. 100 Cal.Rptr. at 707. The parent admitted to the allegations of the petition, and the juvenile court ordered the children into foster care. Six months later, the parent petitioned the court for return of custody of the children, and provided proof that she had obtained a suitable residence for the children. Id. at 708. In response to the parent's request, the State did not contest the parent's claim that she had obtained suitable housing for the children. Instead, a state social worker testified via written report that the children should not be returned to the parent's custody because of the parent's physical, emotional and mental condition. Based upon the worker's report, the court denied the parent's request for return of custody. Id.

In reversing the juvenile court's decision, the California Court of Appeals held the trial court had violated the parent's procedural due process rights, by denying her custody of her children upon grounds other than those alleged in the petition and adjudicated to be true. Id. The court stated that absent adjudicated findings that the parent's physical, emotional or mental condition prevented her from properly caring for the children, the court could not consider such condition when entering dispositional orders. Id.

Other cases also recognize that limitations exist on a juvenile court's authority to enter dispositional orders in child protection proceedings. For instance, in State ex rel. Juvenile Dept.

of Klamath County, 848 P.2d 1239 (Or. App. 1993), the Oregon Court of Appeals upheld a juvenile court's dispositional order requiring a parent to undergo sex offender counseling, on the specific ground that the court at adjudication found that the parent had sexually abused his daughters. 848 P.2d at 1241. Respondent submits that, by this same rationale, the court would not have upheld the juvenile court's dispositional orders if the juvenile court had failed to specifically find the father to be a sex offender. Also, in State in re. Laaran F., 533 N.W.2d 812 (Wis. 1995), the Wisconsin Supreme Court specifically held that "[i]f the court determines that the evidence introduced at the . . . fact-finding hearing was sufficient, it should then make the legal conclusion that the child is need of protection or services. *At the subsequent dispositional hearing, the court should order disposition consistent with the factual grounds proven at trial.*" Id. at 818. The Wisconsin court rejected the State's argument that evidence of parenting deficiencies not alleged in the petition or adjudicated at trial could be raised for the first time at disposition, saying that such a practice would be "onerous to a party opposing the ... petition and is an inefficient use of judicial resources because it requires additional fact-finding at the dispositional hearing." Id.

Utah's appellate courts have not yet addressed this specific issue. However, in the context of criminal matters, Utah's Supreme Court has ruled that procedural due process prevents use of an enhancement statute at sentencing unless the facts justifying the enhancement have been charged and admitted, or otherwise found to be true at the adjudicative phase. See State v. Angus (in order for a firearms enhancement to be used at sentencing, the notice provisions of procedural due process require that the criminal information specifically allege that the defendant is being charged under the enhancement statute, or that a firearm was used in the commission of the offense charged in the information).

Utah Code Ann. §78-3a-305 (4)(c) requires that any child protection petition contain "a concise statement of facts, separately stated, to support the conclusion that the minor child upon whose behalf the petition is being brought is abused, neglected, or dependent." In this case, Respondents admitted to a verified petition alleging that they were homeless and/or incarcerated, and for those reasons were unable to provide care for their children. The state did not allege that Respondents suffer from any psychological or mental impairment, or use drugs. Absent such specific pleading, Respondents were denied notice that the State intended to seek dispositional orders addressing Respondents' psychological status or drug use. Further, no evidence was presented at adjudication to support a finding that the parent's incarceration or homelessness was the result of psychological problems or drug use. Thus, procedural due process precludes this court from entering orders relating to Respondents' psychological functioning, drug use, or any issues other than Respondents' incarceration and lack of stable housing.

Utah Code Ann. §62A-4a-205(6)(c)(199) states that any DCFS service plan should set forth, with specificity, "the specific services needed to reduce the problems that necessitated placement in the division's custody . . . ." Given the adjudicated findings in this case, the service plan should contain the following requirements: (1) Respondents shall not engage in any criminal activity; (2) Respondents shall appear at all hearings related to any outstanding criminal matters, so as to avoid future incarceration in those matters due to Respondents' non-appearance; (3) Respondents shall secure safe, stable housing for themselves and their children; and (4) Respondent shall regularly visit with their children while in foster care. Any other dispositional requirements would constitute a violation of Respondents' procedural due process rights under both the United States and U.S. Constitutions.

DATED this \_\_\_\_ day of March, 2000.

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ATTORNEY  
Counsel for Respondents